STATE OF MICHIGAN

COURT OF APPEALS

MARTIN SHAINA, Personal Representative of the Estate of MARVIN SHAINA, Deceased,

Plaintiff-Appellee,

v

STEVEN WESLEY COMPTON,

Defendant/Cross-Defendant,

and

HARRINGTON, INC., d/b/a TOWN PUMP,

Defendant/Cross-Plaintiff-Appellant.

UNPUBLISHED
September 25, 2007

No. 274045
Wayne Circuit Court
LC No. 05-522388-NO

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant Town Pump (hereinafter "defendant") appeals by leave granted from a circuit court order denying its motion for summary disposition in this dramshop action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. "Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute." *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003).

Defendant Steven Compton was driving his vehicle and struck and killed plaintiff's decedent after leaving defendant bar. Plaintiff contends that defendant is liable because it served alcohol to Compton while he was visibly intoxicated. MCL 436.1801(2) and (3).

To recover under the dramshop act, a plaintiff must prove that (1) decedent was injured by the wrongful or tortuous conduct of an intoxicated person, (2) the intoxication of that person was the sole or contributing cause of decedent's injuries, (3) defendant sold, gave or furnished the alcoholic beverage to the person when he was visibly intoxicated, and (4) defendant's conduct caused or contributed to the person's intoxication and served as a proximate cause of the decedent's injury. *Walling v Allstate Ins Co,* 183 Mich App 731, 738-739; 455 NW2d 736 (1990). The mere fact that the tortfeasor consumed alcohol "is not sufficient to establish that he was visibly intoxicated." *McKnight v Carter,* 144 Mich App 623, 629; 376 NW2d 170 (1985). The plaintiff must show that the tortfeasor's intoxication would be apparent to an ordinary observer. *Miller v Ochampaugh,* 191 Mich App 48, 60; 477 NW2d 105 (1991). Visible intoxication may be proved by circumstantial evidence and reasonable inferences drawn therefrom. *McKenzie v Estate of Taft,* 434 Mich 858, 859 n 2; 450 NW2d 266 (1990) (citation omitted). Such circumstantial evidence "must be actual evidence of the *visible* intoxication" of the tortfeasor, such as his appearance and conduct. *Reed v Breton,* 475 Mich 531, 542-543; 718 NW2d 770 (2006) (emphasis in original).

There is no dispute that Compton had been drinking, and the evidence suggested that he probably consumed more alcohol than described by witnesses. Based on Compton's blood alcohol level of 0.11 at 4:46 a.m., plaintiff's expert opined that Compton's blood alcohol level shortly before he left the bar would have been 0.159 and that it was more likely than not that he would have displayed signs of intoxication. However, such circumstantial evidence cannot alone establish visible intoxication. The focus is on "what behavior, if any, the person *actually manifested* to a reasonable observer." *Reed, supra* at 542-543 (emphasis in original). The court may consider the person's behavior before entering, while in, and after leaving the bar. *Dines v Henning,* 437 Mich 920; 466 NW2d 284 (1991), rev'g 184 Mich App 534 (1990), for the reasons stated in Judge Kelly's dissent; *Lasky v Baker,* 126 Mich App 524, 530-531; 337 NW2d 561 (1983).

Although witnesses indicate that Compton did not show the typical signs of visible intoxication while in defendant's bar, we note "[e]yewitness testimony of visible intoxication is not required to establish a dramshop claim." *Dines, supra* at 540 (Kelly, J, dissenting). Rather, "[t]he relevant inquiry thus posed is whether the combination of circumstantial evidence and the permissible inference drawn therefrom . . . permits a finding that [Compton] was visibly intoxicated when he was last served alcohol at [defendant's bar]." *Heyler v Dixon,* 160 Mich App 130, 146; 408 NW2d 121 (1987).

We believe that a review of the circumstantial evidence proffered in the circuit court demonstrated that a genuine issue of material fact existed regarding whether Compton was visibly intoxicated when last served alcohol at defendant's bar. Notably, the evidence showed that Compton had been drinking, starting at 8:00 p.m. the prior evening, before going to defendant bar where he consumed additional alcohol during the early morning hours. Plaintiff's expert opined that defendant's level of blood alcohol, extrapolated from his breathalyzer results, indicated that defendant's ingestion of alcohol exceeded the reports of witnesses. These factors are consistent with the *Heyler* Court's identification of evidence involving the amount of alcohol consumed and the length of time spent drinking in establishing circumstantial evidence of visible intoxication. *Heyler, supra* at 147. However, we acknowledge such circumstantial evidence, standing alone, is insufficient to establish Compton's visible intoxication.

In addition, *Heyler* indicates that behavior displayed "within minutes" after leaving the bar may also be considered. *Heyler, supra* at 147. Although there is no testimony that Compton was boisterous or loud while in defendant's bar he was the subject of an altercation between two female patrons, which resulted in Compton being asked to leave the premises. Despite being a police officer, albeit off-duty, Compton neither discouraged nor intervened in the altercation, which continued in the parking lot outside defendant's bar. When asked to leave the premises by a security guard, Compton raised his voice, swore at the guard, and drove away at a high rate of speed proceeding the wrong way on a one-way street. Compton then lost control of his vehicle, which resulted in the fatal collision. A witness outside the bar immediately after the accident observed the occupants of Compton's vehicle stumble upon alighting from the truck. As a result, we find that the circumstantial evidence presented, coupled with the reasonable inferences drawn from it, created a material question of fact upon which reasonable minds could differ. Therefore, the circuit court correctly denied defendant's request for summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood